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IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the Merchants' National Bank of Seattle,

Appellee.

REPLY BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the Western District of Washington Northern Division.

B. S. GROSSCUP,
W. C. MORROW,
Bank of California Building,
Tacoma, Washington.

CORWIN S. SHANK,
HORATIO C. BELT,
Alaska Building,
Seattle, Washington.

Solicitors for Appellants.

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CORRECTIONS

Appellee in referring to the statement in Mr. Baker's letter to Mr. Simpson dated May 9, 1904, would have the court believe that "the first two or three payments" mentioned in this letter referred to receivership money. We will quote the testi-

mony on this point that shows conclusively that these payments referred to those made by Mr. Baker to Mr. Simpson.

"Q. Mr. Baker, in connection with your letter of May 9, 1904, to Mr. Mark Reed, you use this language: 'I had a talk with Mr. Simpson in S. F. about the tide lands which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first two or three payments I made myself.' I will ask you to what payments these 'first two or three payments' refer, in that letter?

A. It refers to the first payment that Mr. Simpson made.

Q. The first payment that Simpson made?

A. I settled with Mr. Simpson on the note covering the payments, and this letter refers to that settlement.

Q. In other words, now, let us see if I understand you, in your settlements with Mr. Simpson in 1899 you reimbursed him for what he had reimbursed the trust for on the two payments, and the third payment which he had made was included in that settlement; is that correct?

A. Yes."

On page 12, the appellee says that within a month after Mr. Baker wrote a letter, which followed Examiner Seeley's report to the Comptroller, he sells this asset to Simpson for less than he paid the state therefor. Thereupon appellee remarks

"How this error, if error it was, occurred is nowhere explained." The record does explain it perfectly. Harry Meserve was Mr. Baker's bookkeeper when the first payment was made the state; J. B. Hill was the bookkeeper when the second payment was made the state.

"Q. And Mr. Simpson was to pay you, in addition to what you had paid to the State, fifty dollars for each contract, was that correct?

A. Yes.

Q. That was your arrangement with him?

A. Yes.

* * * * * * * * *

Q. In determining how much you had in these contracts, from whom did you get the information, that is how much the trust had in them, from whom did you get the information?

A. From Mr. Hill, who was the clerk.

Q. He was your clerk and bookkeeper, wasn't he?

A. Yes.

Q. And to the result given you by Mr. Hill, then you added fifty dollars, is that what I understood you to say was done?

A. Yes." (Tr. pp. 261, 262.)

On page 63, appellee says that "Probably no officers have so many opportunities to filch as receivers of national banks. The assets are peculiarly

liquid and mutable. Their acts are not subject to approval nor are their accounts submitted to creditors.'' The testimony is that the character of the examinations of these banks is such that it is impossible to lose sight of any asset, as a strict check is kept by the examiners on everything. (Tr. pp. 275, 339).

On page 71, in referring to the conversations had between Mr. Turner and Mr. Simpson, the appellee says—''Now Turner fixes one of the conversations in 1898'', and again the same statement on page 141 where appellee says—''We have already noted that Turner fixes one of these conversations with Simpson as in the year '98.'' We again call for the record to show appellee's error.

''Q. The Klondike excitement to which you refer was July, 1897?

A. Yes.

Q. And you had the conversation with him after that, did you?

A. Yes.

Q. Can you give the exact time?

A. *No, I cannot.*

Q. Approximately, would you say about what year?

A. I should say 1888 or 1889, or somewhere along there.

Q. You mean 1898-9?

A. 1898-9, yes." (Tr. pp. 143-144.)

CROSS EXAMINATION OF MR. TURNER.

"Q. The first conversation which you referred to you say was in 1898 or 1899, or thereabouts?

A. *I think so.*

Q. You are not certain as to just which year it was?

A. *No.*

Q. It might have been as late as 1900, might it not?

A. *Possibly; I don't think it was that late, however.*" (Tr. p. 145.)

LACHES

Practically all of the citations produced by appellee and a considerable portion of the entire brief is devoted to meeting the question of laches. Counsel for appellee allege as the basis for their argument "actual fraud proved as here" (Brief, p. 138) and "when a defendant, as here, confesses and yet invokes laches" (Brief, p. 66), and "when truth is confessed or overwhelmingly proved by facts obviously not affected by time" (Brief, p. 67), and "in cases of actual fraud" (Brief, p. 68).

In other words, they assume a state of facts as confessed, and proceeding to argue from that

premises say that Mr. Baker should not be permitted to set up laches as a defense.

It will be borne in mind that Mr. Baker sold this property to Mr. Simpson in November, 1897. He repurchased it in March, 1899. Throughout appellee's brief counsel draw no distinction between the actual bona fide sale to Simpson in '97 and their interpretation of the law as to Baker's legal right to repurchase this property, theretofore rightfully sold, while Baker was yet receiver. Does appellee mean to urge to this court that, when the fact at issue is whether the sale to Simpson was fraudulnt or bona fide, Mr. Baker, who testified positively upon this point and was borne out by all the evidence that it was bona fide, should be deprived of the equitable doctrine of laches, simply because, forsooth, the one charging fraud says that if we could prove it it would disclose the fact that you dealt with this estate of which you were trustee, and, therefore, you occupied a fiduciary relation to that estate. All of appellee's argument is based upon the theory that Mr. Baker admits the sale to Simpson as fraudulent and for his own use. We grant the proposition of law that a trustee cannot deal with his own trust. As Mr. Justice Wayne said in the case of *Michoud v. Girod,* 4 How. 552, 11 L.

Ed. 1098, that "persons who were *nominal buyers* of the property for the purpose of conveying it to the executors" must surrender up that property when that fact is proven. But the appellee assumes as a premise for the entire argument upon laches, and as an entire distinction from the rules announced by the court that in a case like that at bar, it is not incumbent upon the one charging fraud to prove when, where and how it was discovered.

The appellee seeks now to justify himself in not even proving the allegations of his bill. He alleges in his bill:

> "The facts herein alleged were wholly unknown to any of the *creditors* and *stockholders* of said bank, and to *plaintiff* and the *Comptroller* of the Currency until the year 1913, and were, *until* that time, *concealed* from them by the defendants, as above set forth, and *were first discovered by the Comptroller* of the Currency on or about the *1st day of February, 1913,*" (Tr. p. 12).

Appellee does not attempt to explain why he *failed utterly* to prove a *single fact* relating to the discovery which he says in the bill was made "on or about the 1st day of February, 1913." We do not know that this is true, and the court has no way of discovering it from the record as there is no proof upon the subject.

In a very labored manner counsel for appellee, seeing the vital character of this omission in the evidence, now say that even if the Comptroller had actual knowledge of fraud, it would not affect the rights of the stockholders and depositors of the bank. They go one step further and say: "The receiver is the instrument of the comptroller," and, therefore, actual knowledge by the receiver would not affect the rights of the stockholders and depositors." (Brief, pp. 44-45).

Laches must arise in the stockholders and depositors, is the claim of appellee. Must it be all the creditors and stockholders or will knowledge by *some* of them be sufficient? Where is the testimony that these hundreds of depositors and stockholders, residing in Seattle all these sixteen years, did not know all these facts all this time, and wait until five principal witnesses were in their graves? Ah, yes; but appellee says in reply to this that Simpson, if alive, could not contradict Baker's own story without making them both ridiculous. But we say, Simpson would not contradict Baker. That's the point at issue.

On page 56 appellee says: "Is a fiduciary to take a trust asset in secret and then debate whether this straw or that should be reckoned knowledge in

those he is trying to deceive?'' We deny, and that is the issue in this case, that when Mr. Baker sold to Mr. Simpson in November, 1897, that he had any reserve interest in these contracts, or that he had any expectancy of subsequently acquiring any such interest. The evidence is abundant upon this point. The appellee assumes that Mr. Simpson took the title at that time for Mr. Baker, and that the sale to Mr. Simpson was a mere blind. The appellee now says that *a theory* announced by him without proof *establishes* that Mr. Baker took this trust asset through Mr. Simpson in secret. Mr. Wing had the advantage of talking with Mr. Simpson, and talking with the bankers and business men of Seattle at that time, and evidently reported that the sale was bona fide in every particular just as Mr. Baker says it was.

In this connection we pause to remark that if Mr. Baker was manufacturing a defense why did he fix the time of the repurchase from Mr. Simpson as March, 1899? He could just as well have made that time years after the close of his receivership.

We think that all of the appellee's ''fiduciary'' and ''non-fiduciary'' cases, which are so frequently referred to in this distinguishing way, are without

any merit whatsoever, *unless you assume as a fact that which is the very issue in this case,* namely, was the sale to Mr. Simpson in November, 1897, a mere sham, or was it bona fide and without reserved interest in Mr. Baker? This is the issue, and this is the basis upon which Mr. Baker has a full right to call to his defense the equitable doctrine of laches when he is deprived of witnesses, who if living would prove beyond a question the correctness of his position, but now that they are dead he is left shorn of this defense, and they, though silent, are being also charged as participators in a crime, the stain of which must rest upon their memory and be a shame and disgrace to their descendants, because of lineage being through men who, though criminally guilty were fortunate in having death o'ertake them before their offenses should be proven and the shame incident thereto visited upon them.

THE RELATION OF THE STATUTE OF LIMITATIONS TO LACHES

On page 43 of appellee's brief it is apparently contended that if this action were at law the statute of limitations would not constitute a bar to a recovery by the complainant in the court below.

The patent issued from the State of Washington

to Norton in October, 1905, was immediately placed on record. The contract price to the state had been previously paid by Baker and the taxes up to that date were paid by Norton in August, 1905. All taxes have since been paid by him annually. (Trans. p. 186). In the Seymour case, 53 Wash. 650, and also in the case of *Tremmel v. Mess,* 46 Wash. 137, it was held that the time does not begin to run until the first annual successive payment has been made. Where back taxes are paid in a lump sum, the time does not relate back of the actual payment to the time of accrual of such back taxes. This we concede, but time does begin to run from the date of actual payment if they are followed up thereafter by the regular annual payment of taxes for a period of seven years.

Lara v. Sandell, 52 Wash. 53, 56.

In the case at bar, under the law of Washington the payment made in August, 1905, included with back taxes the current roll which became delinquent on the first day of June, 1905. The statute of limitations began to run with the payment of these current taxes in connection with back taxes. The evidence shows this payment was followed up regularly by the payment of annual taxes for a

period of more than seven years before the commencement of the suit from the date of that first payment. (Tr. p. 186). The deed which issued from the State of Washington more than seven years before the commencement of this suit would be an absolute bar were it not for the allegations of fraud set forth in the complaint. This seven-year statute is intended to foreclose a title against any irregularities. Even a void deed is color of title.

Lara v. Sandell, supra.

The evidence wholly negatives the allegations of the complaint that the court order of sale made at the instance of Seeley was procured through any fraud. If, as the lower court found, the authority to sell did not exist, the seven-year statute is an absolute bar. If the complainant had a right to recover this land upon the facts disclosed by the record of the title for a period of seven years after the issuance of the deed by the State, he cannot now set up some other ground cognizable in equity by means of which an extension of the time will be allowed.

This action might have been commenced as an action at law to recover this property under Section 785 of I Rem. & Ball. Codes & Statutes.

"Any person having a valid subsisting interest in real property and a right to the possession thereof may recover the same by action in the Superior Court of the proper county to be brought against the tenant in possession; if there is no such tenant, then against the person claiming title or some interest therein, and may have judgment in such action quieting or removing a cloud from the plaintiff's title."

This section was construed in *Smith v. Wingard,* 3 Wash. Terr. 291, in which Mr. Justice Turner says:

"While the primary object of the law, as we find it in this chapter, is to determine the question of title to the land, that question is to arise, we think, in litigation about the possession of the land. The action therein contemplated is the common-law action of ejectment with the added incident of determining in the action the paramount legal or equitable title and with the departure of permitting the action to be brought against one not in possession but who claims title to or interest in the land. Its chief virtue is that it makes the determination of title *res adjudicata.* The same result was obtained at common law by the action of trespass to try title, as it was called."

This construction has since been affirmed in *Brown v. Baldwin,* 46 Wash. 106; *Dueber v. Wolfe,* 47 Wash. 634.

If suit had been brought as a law action, there would be no question about its bar by the statute of limitations. The Petticrew case, 61 Wash. 614,

and McDowell case, 72 Wash. 224, cited by the appellee do not have any application to the case at bar.

The complainant, however, apparently seeks to avoid the mandatory effect of the statute of limitations by invoking the doctrine of trusts and pursuing the equity road of procedure to acquire possession with clear title in the place of the law road, which he might have pursued under the Washington practice. He had his choice of remedies, but by taking the equity course he will not be permitted to enlarge his rights by limiting and curtailing the defenses of the defendant.

"Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the Statute of Limitations which govern courts of law in like cases, and this rather in obedience to the Statute of Limitations than by analogy. *Wagner v. Baird,* 7 How. 234. In many other cases they act upon the analogy of the statutory limitations at law, as where a legal title would in ejectment be barred by twenty years adverse possession courts of equity will act upon the like limitation and apply it to all cases of relief sought upon equitable titles or claims touching real estate. *Moore v. Greene,* 2 Curt. 202; 2 Story, Eq. Jur., 8th Ed. 520; *Farnum v. Brooke,* 9 Pick. 243."

Godden v. Kimmel, 99 U. S. 201, 210, 25 L. Ed. 431.

This language was applied in a later case by

Mr. Chief Justice Fuller, and the word "usually" from the above quotation was stricken out. The following is the language of the learned Chief Justice:

"Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitations which govern actions at law."
Metropolitan National Bank v. St. Louis Despatch, 149 U. S. 436.

Reaffirmed in *Baker v. Cummings,* 169 U. S. 189, 205, where it is said:

"As said in *Metropolitan National Bank v. St. Louis Despatch Co.,* 149 U. S. 448: 'Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern actions at law.' That Cummings might at his election have pursued a remedy for the alleged fraud in a court of law is obvious. And it is equally clear that such remedy at law, by action on the case predicated on the facts as to deceit and fraud, which are alleged in the bill now before us, would have been barred in three years from the discovery of the fraud under the Statutes of Limitation of Maryland of 1715, chap. 23, § 2, in force in the District of Columbia, 1 Kilty's Statutes, 111; Comp. Laws. Dist. Col. chap. 42, § 6, p. 360. It hence follows, irrespective of the equitable doctrine of laches, that the relief which the bill seeks to obtain ought not to be allowed by a court of equity."

It follows that where the statutory period within which an action may be brought has elapsed, facts and circumstances in avoidance of the statute

must be alleged and proved. Fraudulent concealment, fraudulent representations and like conduct have been held in cases of purely equitable cognizance sufficient to extend the statutory period, and in analogy with this equitable doctrine we have the statutory provision in the State of Washington poviding that where the action is based on fraud it may be brought within three years after the discovery of the fraud. This statute is but a declaration of the ordinary equity rule with the incident of fixing a definite time.

Equity jurisprudence is a court-made structure to avoid the rigors of the law, but its beneficence can be invoked in those cases only where it is shown that the strict application of legal rules would work injustice. There is no distinction between fiduciary cases and any other kind of a case in the application of this rule. The attempted distinction argued by the appellee, if it exists at all goes only to the degree of proof and not to the principle.

Equity says that a party shall not be permitted to take advantage of the statute of limitations where the lapse of time has resulted from his fraudulent manipulation, but where the facts and circumstances of the fraud are known to the oppo-

site party the bar of time will nevertheless run because in that case there has been no deception. The equity rule withholding the benefit of the statute of limitations is in the nature of an estoppel to set up and claim the benefit of the statute. Such an estoppel cannot exist where there is knowledge of the facts.

It is contended by the appellee that the burden is upon us to show when *they* came into possession of the facts constituting the basis of this action. We have shown that at law the action was barred by lapse of time. We have shown that by analogy if the action is one purely in equity, the length of time has run which equity courts declare a bar by application of the doctrine of laches. To avoid this application of the law rule to suits in equity the complaint alleged that the complainant did not come into possession of the facts until the year 1913, but produced no evidence in support of this everment. The complainant must have come into possession of the facts at some time before he prepared his complaint. When he acquired and how he acquired knowledge of these facts is matter peculiarly within his ability to show. If equity procedure were to require us to show when our opponents acquired this knowledge, it would amount

to giving them the benefit of equity's beneficence without requiring them to comply with the burden of showing the facts peculiarly within their knowledge upon which that beneficence is based. To require us to show when they got possession of the facts which they plead in their bill would amount practically to a denial to us of the benefit of lapse of time which both the law and equity recognize as a sound and meritorious defense, a defense grounded in public policy.

There should be no confusion of the rule relative to equitable avoidance of lapse of time as a bar when applied in analogy to the statute of limitations and equitable estoppel which may be supplied regardless of the lapse of time. There are cases which hold where equitable estoppel is relied upon as a ground of defense it is incumbent upon the pleader of such estoppel to aver and prove all the facts constituting the estoppel.

Where the statutory period has elapsed and the remedy would be defeated by the statute of limitations if the action were at law, and by analogy by the lapse of the same period as constituting laches if the action is in equity, then it becomes incumbent upon the party claiming exemption from the effect of the lapse of time to prove all the facts

entitling him to the exemption. This proposition is supported by all the cases, fiduciary and non-fiduciary.

The appellee has cited and apparently relies upon some cases where the acquisition of a title by fraudulent means has been confessed by a demurrer or directly by answer and estoppel is relied upon as a defense. That class of cases can have no application here.

The argument that this was an express trust manifestly defeats its own purpose. If Baker took this contract to hold as an express trust, he repudiated such express trust as soon as he made a conveyance to Simpson, whether such conveyance was made for his own use or for Simpson's use, and in that case the statute would begin to run from the date of the conveyance.

It would serve no useful purpose to review in detail the points made in our opening brief or to discuss in detail the cases cited by the appellee.

THE COMPLAINANT'S RIGHT TO ACQUIRE THIS PROPERTY

The appellee attempts to avoid a fundamental proposition in this case, to the effect that the administrators of this trust are attempting to bring

into the trust fund by means of this suit property which the law forbids them to acquire, by asserting that the acquisition of this property will give added value to the upland previously acquired by the Bank. The Supreme Court of the United States answered a similar fallacy in the Converse case, where it was attempted to justify the acquisition of corporation stock at protecting a previous investment. It is sufficient answer to say that the law does not authorize any investment for any such purpose.

But in this case we have the additional fact that the making of this contract was not intended for any such purpose because both the Receiver and the Comptroller expressed the view at the time that it was a profitable speculation and that the intention was to sell the block or the right to the block, which the map shows is separated from the upland property by other tideland blocks and intervening streets.

Respectfully submitted,

B. S. GROSSCUP,
W. C. MORROW,
CORWIN S. SHANK,
HORATIO C. BELT,
Solicitors for Appellants.